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EIN-03-276-51116

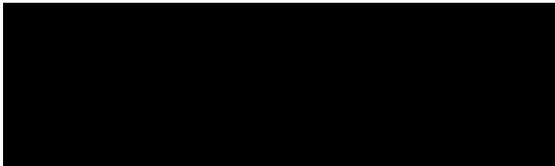
Office: NEBRASKA SERVICE CENTER

Date: **DEC 21 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and sandwich shop. It seeks to employ the beneficiary permanently in the United States as a food service manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of food service manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	0
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the job offered in order to perform the job duties listed in Item 13 of the Form ETA 750A which include the following: "Responsible for overall operations of a restaurant/sandwich shop; shall supervise and train all employees while establishing daily schedules. Shall maintain all daily financial records for restaurant including receipts accounts payable and employee payroll; shall be responsible for inventory control and restaurant sanitation."

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for Viba Corporation, a sandwich shop located at [REDACTED] in Northbrook, Illinois as a manager for 40 hours a week from January 1998 to November 1999 performing duties similar to the proffered position. Prior to that, the beneficiary represented that he worked for Reshma Enterprises as a manager of a sandwich shop, located at [REDACTED] in Chicago, Illinois, for 40 hours per week performing duties similar to the proffered position from March 2000 to the date he signed the Form ETA 750B, which was April 27, 2001.

With the initial petition, the petitioner submitted a letter dated April 5, 2001 on Subway letterhead with an address at [REDACTED] Northbrook, Illinois, confirming that the beneficiary was employed as a manager of that sandwich store "for the period of 1998 and 1999 two years [sic]." The letter was signed by the store owner, [REDACTED] (Mr. [REDACTED]) and provided no other details.

Because the evidence was insufficient, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on March 1, 2004. The director noted that the beneficiary's employment experience letter conflicted with the representation on the Form ETA 750B and requested corroborating evidence of the beneficiary's actual employment with Viba Corporation (Subway) for two years, such as paystubs or W-2 forms.

In response to the director's request for evidence, the petitioner submitted another letter dated March 29, 2004 on Subway letterhead with an address at [REDACTED] Northbrook, Illinois, signed by Mr. [REDACTED] as "President" who stated the following, in pertinent part:

We wish to certify that [the beneficiary] was employed at VIBA Incorporated as a manager of our Subway Sandwich location at [REDACTED] [The beneficiary] worked for two fiscal years 1998 to 1999, respectively. Chronologically [sic], he worked in a full time capacity from October 1998 to November 1999. We apologize about the confusion.

VIBA Incorporated sold the underline [sic] Subway Sandwich Shop to T-LAX Corporation who presently owns and operates the restaurant.

The petitioner also submitted copies of W-2 forms issued by both Viba Corporation and T-LAX Corporation to the beneficiary reflecting wages paid in 1999 in the amount of \$1,025.00 and \$2,700.00, respectively.

The director denied the petition on July 20, 2004, stating that the evidence in the record of proceeding was insufficient to establish that the beneficiary was qualified to perform the duties of the proffered position because the beneficiary's represented employment at Viba Corporation would only constitute 13 months of qualifying experience, which is less the 2 years of experience required by the proffered position, and because the low wages paid to the beneficiary by both Viba and T-Lax Corporations reflect that he was either employed for a short term or was not working full-time.

On appeal, substituted counsel asserts that CIS erred by failing to consider evidence of the beneficiary's employment with Reshma Enterprises, a letter she claims was submitted with the initial filing as well as in response to the director's request for evidence. Additionally, counsel asserts that CIS erred by failing to consider evidence of the beneficiary's completion of a ServSafe Food Protection Manager Certificate Examination. Counsel claims that the

¹ Apparently this was a typographical error and intended to be "West."

director's consideration of the low wages paid by T-LAX and Viba Corporations was in error since the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date did not arise in his decision. Counsel references a DOL policy about equivalency determinations with respect to foreign degrees and states that had CIS collaborated with DOL, it would have had access to documentation about the beneficiary's qualifications for the proffered position.

On appeal, the petitioner submits a notarized affidavit from [REDACTED] (Mr. [REDACTED]) stating that he worked with the beneficiary at Viba Corporation at its Subway sandwich shop in Northbrook, Illinois and was paid cash like the beneficiary; a notarized affidavit from the beneficiary claiming he was paid cash while working for Viba Corporation at its Subway sandwich shop in Northbrook Illinois and also worked for Reshma Corporation where he was paid a salary in cash; a new letter from Viba Corporation signed by Mr. [REDACTED] and dated September 8, 2004 stating that he often paid the beneficiary in cash; a letter from Reshma Enterprises dated September 13, 2004, signed by the President and stating that the beneficiary worked as a manager from March 2000 until at least May 2001 on a full-time basis and was paid in cash; copies of Viba Corporation/Subway employment experience letters previously submitted into the record of proceeding; documentation pertaining to the beneficiary's completion of various food service manager state and local examinations; and the petitioner's tax returns and bank statements.

At the outset, the AAO notes that the proffered position has no degree requirement and thus counsel's reference to the equivalency policy determination by DOL is inapplicable to the instant case². Additionally, counsel misstates the substance and timing of evidentiary submissions into the record of proceeding. Prior to the instant appeal, the record of proceeding did not contain any evidence of the beneficiary's employment at Reshma Corporation or his completion of the Serv/Safe Food Protection Manager Certificate Examination. Regardless, the Form ETA 750 A does not require completion of the Serv/Safe Food Protection Manager Certificate Examination and is thus not an issue for discussion concerning the beneficiary's qualifications for the proffered position. The Form ETA 750 B, Items 12 through 14 likewise do not specify the beneficiary's completion of the Serv/Safe Food Protection Manager Certificate Examination or its application or relevance to his qualifications for the proffered position³.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

² The record of proceeding contains copies of school certificates submitted with the initial petition reflecting the beneficiary's completion of secondary school as well as two years of college at Govt. Islamia Science College in 1998 which meets the educational requirements set forth by the proffered position set forth on Item 14 of the Form ETA 750A.

³ On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as intended. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The AAO concurs with the director’s determinations. All of the letters from Viba Corporation (Subway), including the one submitted on appeal, never provided “a description of the training received or the experience of the alien” as plainly required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Additionally, the petitioner failed to provide sufficient corroborating evidence of the beneficiary’s full-time employment with Viba Corporation (Subway) for 13 months. On appeal, the petitioner submits affidavits from Mr. [REDACTED] and the beneficiary; however, these affidavits fail to include a description of the beneficiary’s duties and are not signed by the beneficiary’s supervisor which fail to conform to 8 C.F.R. § 204.5(l)(3)(ii)(A). Even if the affidavits conformed to the regulatory requirements or were assigned more significant evidentiary weight since they fail to conform to 8 C.F.R. § 204.5(l)(3)(ii)(A), they would still only show that the beneficiary had 13 months of qualifying employment experience instead of the requisite two years. Despite Mr. [REDACTED] and the beneficiary’s claims of being paid in cash for their employment, no further corroborating evidence was submitted⁴. The director’s consideration of the low wages received by the beneficiary from Viba Corporation (Subway) and its successor entity properly extrapolated that it was improbable that the beneficiary was employed on a full-time basis since an annual income of approximately \$3,000 corresponds to an hourly rate of \$1.44, which is below minimum wage. Likewise, the letter submitted from Reswa Enterprises on appeal fails to comply with the requirements set forth at 8 C.F.R. § 204.5(l)(3) as it also fails to provide “a description of the training received or the experience of the alien.”

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Such evidence could include payroll register excerpts, bank records, cash receipt records, etc.